

**BEFORE THE AMERICAN ARBITRATION ASSOCIATION  
COMMERCIAL ARBITRATION PANEL**

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**AAA CASE NO. 77 190 E 00276 12 JENF**

In the Matter of the Arbitration between

Christopher Kyle Carr, JR Celski, Alyson Dudek,  
Emily Scott, Travis Jayner, Jeff Simon,

Claimants,

and

US Speedskating,

Respondent.

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**REASONED AWARD**

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Commercial Arbitration Rules (“Commercial Rules”) of the American Arbitration Association (“AAA”), pursuant to the Ted Stevens Olympic and Amateur Sports Act and the United States Olympic Committee Bylaws Section 9, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, conducted oral argument on the motion to dismiss for lack of jurisdiction by telephone on September 28, 2012, and conducted a hearing on the merits of the remaining issues by telephone on November 2, 2012, do hereby, AWARD, as follows:

**I. INTRODUCTION**

1.1 Claimants Erin Bartlett, Allison Baver, Christopher Kyle Carr, JR Celski, Alyson Dudek, Jonathan Garcia, Morgan Izykowski, Travis Jayner, Levi Kirkpatrick and Jordan Malone, James Rodowsky, Jeff Simon, Kyle Uyehara, and Emily Scott (the names of the Claimants have changed during the course of this arbitration because of their qualification or non qualification for the 2012 short track speedskating team mid-way through the proceeding, but the allegations remained the same; the list in this paragraph represents every individual appearing as a Claimant in this action but the caption above reflects the final Claimants remaining in the case after the qualifying event for the World Cup competition at issue) (collectively, all of the foregoing named individuals shall be referred to herein as “Claimants”) were represented by Edward Williams, Esq., of the law firm Stewart Occhipinti. Claimants alleged that the national team coach provided by US Speedskating engaged in inappropriate conduct directed to them including directing one a skater to tamper with the blades of another skater from another country at an international event to affect their athletic performance. The Claimants alleged that this coach had

essentially created a hostile training environment that threatened their ability to train and qualify for the upcoming World Cup short track speedskating events. Among other things the Claimants sought removal of the national team coaches from their roles or in the alternative the provision by US Speedskating of alternative coaches to work with the Claimants as they prepared to compete and to travel with them to international events.

1.2 Respondent US Speedskating (consistent with the Claimants' identities so too did the total Respondents' identities change in this case; at the time of this writing US Speedskating is the only named Respondent) was represented by Steve Smith, Esq. and Lucinda McRoberts, Esq. of the law firm Bryan Cave HRO. Respondent challenged jurisdiction in this case and alleged essentially that the Claimants' allegations were without merit. At the same time, US Speedskating was engaging in a parallel review of the allegations through alternate internal proceedings.

1.3 This high profile case proceeded through a relatively difficult, condensed, and very expedited process. During the pendency of the case in chief over the course of several weeks there were nearly daily case deadlines, frequent status conferences with the parties and the Arbitrator, and tremendous press attention and coverage given the allegations being made. The Arbitrator issued a detailed procedural order, and revisions and iterations thereto, which, to be frank, the Claimants and US Speedskating both often had difficulty adhering to strictly with respect to ordered deadlines. At one point, after the dust had settled on the parties presenting their respective witness lists, the witness tally in total exceeded 50, which likely would have made this the most complex proceeding in the history of arbitrations arising under the Ted Stevens Olympic and Amateur Sports Act and the United States Olympic Committee ("USOC") Bylaws. There was also a challenge to jurisdiction which the Arbitrator resolved in favor of finding jurisdiction over this dispute. The Claimants' counsel, and the USOC, requested that the Arbitrator provide a written decision on jurisdiction, which reasoned decision is included herein (Claimants' counsel agreed that the Claimants would pay for that portion of the award, which the Arbitrator agreed to cap at 12 hours).

1.4 Once the proceeding was largely dismissed on the merits, Claimants counsel sought a reasoned award on the issues of jurisdiction and his remaining claim for relief seeking shifting of arbitration related fees and costs.

1.5 After considering the arguments of the parties and their counsel, and for the reasons set forth below, the Arbitrator has determined that the Arbitrator was properly seized with jurisdiction, and that, as a result of the conduct that caused this case in the first place, US Speedskating should be entirely responsible for the costs of the arbitration (the AAA filing fees and the Arbitrator's fees) in this matter less the arbitrator fees attributable to the jurisdictional motion award drafting which Claimants agreed to pay entirely.

1.6 The Arbitrator wishes to commend the contributions of counsel in this case. The circumstances of this case required greater time pressures, and more work product creation, in a shorter time, with greater complexity, than any other Olympic-

related case in which I have been involved and, while there were occasional hiccups along the way, counsel performed admirably in their representation of their clients and satisfying a fairly intense time and work level burden over a sustained period of time in this case. Some of the counsel in this case were experienced, and relatively speaking old timers, in these kinds of cases, particularly counsel for Claimants and for Respondents, but it was a pleasure to see relative newcomers to these cases, such as counsel for the later dismissed coaches, Russell Fericks, Esq., of the law firm Richards, Brandt, Miller & Nelson, and Erik Christiansen, Esq., of the law firm Parsons Behle, comport themselves so well even under the relatively unusual time-constrained procedures that apply in these types of Olympic-related cases. The Arbitrator's involvement in this case would have been poorer without the commendable briefing, responsiveness, and arguments of all counsel in this case.

## **II. THE FACTS**

2.1 Since the issues that must be resolved by this award do not involve a fact-finding or a determination on the merits in the usual course, and the case never reached its hearing on the merits, the "facts" referenced in this award consist largely of the procedural history, the parties' filings, and legal arguments. While the Arbitrator has considered all of the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, this Award refers only to the submissions and evidence considered necessary to explain the Arbitrator's reasoning.

## **III. PROCEDURAL HISTORY**

3.1 The Demand for Arbitration in this matter was filed and served on September 18, 2012. The Demand essentially alleged and sought relief as more fully set forth below concerning the contents of the Amended Demand.

3.2 On September 20, 2012, the Arbitrator was appointed in accordance with the AAA's Commercial Arbitration Rules. No party objected to the appointment of the Arbitrator.

3.3 On September 20, 2012, the Arbitrator convened a preliminary hearing in this matter and issued an Initial Scheduling Order (Procedural Order No. 1) on September 25, 2012 after affording the parties an opportunity to provide input.

3.4 Upon request by US Speedskating and in accordance with the Initial Scheduling Order (Procedural Order No. 1), the Arbitrator required the Claimants to file a more specific statement of their claims.

3.5 In their Amended and Restated Demand for Arbitration filed on September 27, 2012, Claimants sought the following relief:

“(a) an expedited hearing before the AAA (for the reasons set forth in the annexed Section 9 Complaint and an Order requiring that USS not

have Jae Su Chun, and his two assistant coaches, Jun Hyung Yeo and Jimmy Jang, coach or travel in any capacity with the 2012-2013 World Cup Short Track team; and that USS engage a coach (or coaches) and such supporting staff as is necessary to provide high level of coaching to the short track skaters who make the Team in a non-abusive and support environment.

(b) an award granting Claimants their costs and expenses, including the \$850 AAA filing fee in this matter, and directing Respondent to pay the arbitrator's fee and Claimants' counsel's reasonable attorneys' fees; and

(c) granting Claimants such other, additional and different relief, as the arbitrator may deem just and proper under the circumstances."

3.6 Counsel for two of the three affected coaches (Jimmy Jang never appeared in this matter) and US Speedskating collectively brought a motion to dismiss this action on the basis of lack of jurisdiction, arguing essentially, that this case did not implicate a denial or threatened denial of the opportunity to participate of the Claimants and that this case should be stayed pending the outcome of other proceedings occurring within or involving US Speedskating. This motion was fully briefed and later denied by the Arbitrator in a summary decision as follows:

"Dear Parties and Counsel:

Having considered the papers, exhibits, authorities, and arguments submitted in support of the motion to dismiss on the basis of lack of jurisdiction, the Arbitrator has determined to deny the motion and finds that arbitration jurisdiction exists here and on these specific facts. The Arbitrator will provide reasons for this this decision at a later date but wanted the parties to know the outcome of this motion at the earliest opportunity so the case can proceed. The Arbitrator appreciates the careful, well-presented, and well-reasoned arguments and briefing of counsel on this important issue.

Sincerely,"

3.7 On October 11, 2012, the Arbitrator held a further status conference and preliminary hearing to discuss discovery and preparation for the impending hearing on the merits. On that call it was revealed by US Speedskating, and confirmed by counsel for the appearing affected coaches, that the affected coaches had resigned their positions with US Speedskating, thereby mooting one of the claims for relief in this arbitration.

3.8 Following the October 11, 2012 teleconference hearing, the Arbitrator issued Procedural Order No. 4 which set forth the dismissals and a briefing schedule for the request of the Claimants that the Arbitrator issue an award in favor of Claimants for

their portion of the fees of the AAA, the Arbitrator, and their attorney's fees. Several briefs were filed and a hearing for oral argument on the request was held on November 1, 2012. This reasoned decision followed within 30 days of the final submission of evidence of Claimants in the form of their sur-reply brief on November 15, 2012.

#### IV. LEGAL ANALYSIS

##### a. Jurisdictional Issues

4.1 The Federal Arbitration Act ("FAA") states, in part:

"A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. *Mose H. Cone Mem'l Hosp. v. Mercury Const. Co.*, 460 US 1, 24-25 (1983). "Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614, 626 (1985). As noted very recently by the US Supreme Court, as an example of its long line of jurisprudence on this subject since the passage of the FAA, the FAA "declare[s] a national policy favoring arbitration." *Nitro-Lift Technologies, LLC v. Eddie Lee Howard*, 568 US \_\_\_\_ (November 26, 2012). Under the AAA Commercial Arbitration Rules Section R-7, the arbitrator is empowered to determine the issue of arbitrability.

4.2 The Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §220501, *et seq.* ("the Act"), is replete with a wide variety of references to arbitration as the basis for resolving disputes between sports organizations in the Olympic movement and participants, such as athletes, trainers, coaches, managers, and officials.

4.3 Section 220503(8) of the Act requires the USOC:

"(8) to provide swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur athletic competition;"

36 U.S.C. § 220503(8).

4.4 Section 220505(c)(5) of the Act requires the USOC to:

“(5) facilitate, through orderly and effective administrative procedures, the resolution of conflicts or disputes that involve any of its members and any amateur athlete, coach, trainer, manager, administrator, official, national governing body, or amateur sports organization and that arise in connection with their eligibility for and participation in the Olympic Games, the Paralympic Games, the Pan-American Games, world championship competition, the Pan-American world championship competition, or other protected competition as defined in the constitution and bylaws of the corporation;”

36 U.S.C. § 220505(c)(5).

4.5 Section 220509(a) of the Act requires the following of the USOC (referred to as “corporation” throughout the Act):

“The corporation shall establish and maintain provisions in its constitution and bylaws for the swift and equitable resolution of disputes involving any of its members and relating to the opportunity of an amateur athlete, coach, trainer, manager, administrator, or official to participate in the Olympic Games, the Paralympic Games, the Pan-American Games, world championship competition, or other protected competition as defined in the constitution and bylaws of the corporation.”

36 U.S.C. § 220509(a).

4.6 Section 220522(a)(4) of the Act requires that a NGB:

“(4) agrees to submit to binding arbitration in any controversy involving—

- (A) its recognition as a national governing body, as provided for in section 220529 of this title, upon demand of the corporation; and
- (B) the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition, upon demand of the corporation or any aggrieved amateur athlete, coach, trainer, manager, administrator or official,

conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified and provided for in the corporation’s constitution and bylaws, except that if the Athletes’ Advisory Council and National Governing Bodies’ Council do not concur on any modifications to such Rules, and if the corporation’s executive committee is not able to facilitate such concurrence, the Commercial Rules of Arbitration shall apply unless at least two-thirds of the corporation’s board of directors approves modifications to such Rules;”

36 U.S.C. § 220522(a)(4).

4.7 Section 220522(a)(8) of the Act requires that a NGB:

“(8) provides an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, sex, age, or national origin, and with fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator, or official before declaring the individual ineligible to participate;”

36 U.S.C. § 220522(a)(8).

4.8 The USOC Bylaws further elaborate on this arbitration scheme. Section 9.1 of the USOC Bylaws provides as follows:

“No member of the corporation may deny or threaten to deny any amateur athlete the opportunity to participate in the Olympic Games, the Pan American Games, the Paralympic Games, a World Championship competition, or other such protected competition as defined in Section 1.3 of these Bylaws nor may any member, subsequent to such competition, censure, or otherwise penalize, (i) any such athlete who participates in such competition, or (ii) any organization that the athlete represents . . .”

4.9 Under USOC Bylaws Section 1.3(u), “protected competition” means:

“1) Any amateur athletic competition between any athlete or athletes officially designated by the appropriate NGB or PSO as representing the United States, either individually or as part of a team, and any athlete or athletes representing any foreign country where (i) the terms of such competition require that the entrants be teams or individuals representing their respective nations and (ii) the athlete or group of athletes representing the United States are organized and sponsored by the appropriate NGB or PSO in accordance with a defined selection or tryout procedure that is open to all and publicly announced in advance, except for domestic amateur athletic competition, which by its terms, requires that entrants be expressly restricted to members of a specific class or amateur athletes such as those referred to in Section 220526(a) of the Act; and

2) any domestic amateur athletic competition or event organized and conducted by an NGB [*sic*] or PSO in its selection procedure and publicly announced in advance as a competition or event directly qualifying each successful competitor as an athlete representing the United States in a protected competition as defined in 1) above.”

4.10 USOC Bylaws Section 9.7 provides that, “If the complaint [under Section 9.1] is not settled to the athlete’s satisfaction the athlete may file a claim with the AAA

against the respondent for final and binding arbitration.” Under both Sections 9.7 and 9.9 of the USOC Bylaws, the arbitration proceeding may be expedited at the request of the athlete.

4.11 The Act not only created the USOC as a federally chartered corporation, but also authorized it to recognize NGBs for Olympic Sports. *See* 36 U.S.C. §§ 220502(a), 220505(c)(4), 220521(a). Under this grant of authority, the USOC has recognized US Speedskating as the NGB for speedskating, including for short track speedskating. In turn, the Act empowers NGBs such as US Speedskating to "establish procedures for determining eligibility standards for participation in competition." *Id.* § 220523 (a)(5). However, the Act does not leave the choice of procedures entirely up to NGBs, instead requiring them to "agree[] to submit to binding arbitration in any controversy involving . . . the opportunity of any amateur athlete . . . to participate in amateur athletic competition, upon demand of the [USOC] or any aggrieved amateur athlete . . ." *Id.* § 220522(a)(4)(B). There can be little doubt, as courts have observed, *see, e.g., Barnes v. Int'l Amateur Athletic Fed'n*, 862 F. Supp. 1537, 1544 (S.D. W. Va. 1993) (stating "Congress made clear choices to keep disputes regarding the eligibility of amateur athletes to compete out of the federal courts."), that Congress intended for eligibility questions to be decided through arbitration, rather than litigation. Notably, the Seventh Circuit has taken a similarly dim view of the role of courts with respect to eligibility determinations in Olympic sports. *See Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580 (7th Cir. 2001). In *Slaney*, an amateur athlete brought a variety of Indiana state law contract and tort claims against the USOC in relation to the International Amateur Athletic Federation (IAAF) arbitral panel's determination she had committed a doping offense. 244 F.3d at 586-88. In affirming the district court's dismissal of Slaney's claims for lack of subject matter jurisdiction, the Seventh Circuit stated, "when it comes to challenging the eligibility determination of the USOC, only a very specific claim will avoid the impediment to subject matter jurisdiction that 36 U.S.C. § 220503(3) poses." *Id.* at 595, 595-96. In describing exactly which claims might survive, the Seventh Circuit cited a federal district court case from the District of Oregon: There, the court cautioned that "courts should rightly hesitate before intervening in disciplinary hearings held by private associations. . . . Intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in serious and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies." Yet, while carving out this limited exception to the preemption created by the then named Amateur Sports Act (the predecessor statute to the Act), the opinion forewarned that while examining whether internal rules had been complied with, the courts "should not intervene in the merits of the underlying dispute." *Id.* at 595-96 (quoting *Harding v. US. Figure Skating Ass'n*, 851 F. Supp. 1476, 1479 (D. Or. 1994)). *See also Armstrong v. Tygart*, \_\_\_ F.Supp. \_\_\_ (WD Texas 2012).

4.12 This arbitration friendly and directed scheme in the US is consistent with the international sports arbitration structure as well where international sports disputes involving Olympic family member organizations and athletes and others are, with few exceptions, required to be resolved in arbitration before the Court of Arbitration for Sport, which can be reviewed, and often is, by the Swiss Federal Tribunal (the Swiss



supreme court). *See generally* Paolo Patocchi and Matthias Scherer, *The Swiss International Sports Arbitration Reports* (Jurisnet 2012); Beloff, et al., *Sports Law* 258-313 (2d ed.) (Hart 2012); Ian Blackshaw, *Sport, Mediation and Arbitration* (TMC Asser 2009). There is authority that suggests in fact that the international arbitration scheme in sports was borne of the efforts of the USOC here in the United States in the early 1970s. *See* Andrea Steingruber, “Sports Arbitration: How the Structures and Other Features of Competitive Sports Affect Consent As It Relates To Waiving Judicial Control”, 4 *Am. Rev. Int’l Arb.* 69 n. 63 (noting, from a European commentator, that sports arbitration worldwide was, “First incorporated in a U.S. statute that compelled national federations to provide for a framework of arbitration to resolve disputes related to participation in the Olympic Games,[and] the trend now seems to have been accepted, with the adoption by governments of the World Anti-Doping Agency Code (‘WADA Code’), that designates the CAS as the only forum for the resolution of international disputes in this area”, and that, “In 1974, the bylaws of the U.S. Olympic Committee (“USOC”) were amended by two provisions permitting the resolution of disputes concerning participation at the Olympic Games before an arbitral tribunal constituted under the auspices of the American Arbitration Association (“AAA”). In 1978, these provisions were incorporated into the U.S. Amateur Sports Act, providing for recourse to arbitration, 36 U.S.C. § 220529.”).

4.13 In light of the overwhelming statutory framework, comprehensive and consistent case law, and general structure of Olympic sports domestically and worldwide, an arbitrator will be hard-pressed to find a lack of jurisdiction over cases that fall within the fundamental ambit of the arbitration provisions of the Act and the USOC Bylaws. The exceptions may be few and far between. Here, the fundamental question raised by the moving parties on the motion to dismiss is whether the claims of Claimants rise to the level of satisfying the requirement under Sections 220503(8), 220505(c)(5), 220509(a), 220522(a)(4), and 220522(a)(8) of the Act and Section 9.1 of the USOC Bylaws that such claims involve a denial or threatened denial of the “opportunity” “to participate” in “amateur athletic competition” so as to give rise to arbitration jurisdiction in this proceeding. I find that the allegations here satisfy this requirement.

4.14 Claimants have alleged that their coaches, individuals who occupy a position of trust in the sporting hierarchy over athletes under their tutelage, who were hired by US Speedskating, including at least one as an employee, to provide coaching services to the elite speedskating athletes who were the Claimants training near Salt Lake City engaged in, or allowed to occur, various acts of coaches pushing and shoving athletes, yelling at athletes in public, throwing a notebook at them, referring to “roughing up” other athletes, banning athletes from team dinners for seeming minor indignities perceived by the coach, directing skaters to be obnoxious toward competitors and in one instance to modify their skate blade so as to cause that skater to fall during competition, screaming insults at skaters and calling them names, throwing sports equipment, water bottles, and chairs at or in the presence of skaters, overtraining athletes to the point where they suffered injury requiring surgery, ignoring athletes for extended periods without explanation, and conducting themselves in various similar ways over an extended period of time. For these alleged violations, Claimants sought an expedited hearing and an

order prohibiting the coaches from coaching or traveling with the 2012-2013 World Cup Short Track Team and that US Speedskating engage a coach and other support staff to provide a high level of coaching to short track skaters who make the team in a non-abusive and supportive environment, an award of Claimants attorneys fees, costs, and arbitration expenses, and other appropriate relief.

4.15 In this case, US Speedskating was not alleged to be directly preventing the skaters from competing in any event in the sense that US Speedskating was not refusing to enter them in a protected competition. In essence, what US Speedskating was being alleged to have done was to have created a “constructive”, as opposed to an actual, denial of the opportunity to participate as a result of its actions, or at least as a result of the actions of its coaches imputed to US Speedskating. In sum, the argument of Claimants was that because of the hostile training environment to which US Speedskating was subjecting these athletes these athletes felt compelled to leave the US Speedskating provided training program and training regimen, which indirectly would threaten their opportunity to participate by not allowing the Claimants to train to their full potential. This Arbitrator is unaware of a single other case addressing this issue and indeed no party cited a case on point on either side of the argument.

4.16 I am guided here by several parts of the statutory and common law arbitration principles that apply. I must start from the premise that the FAA sets forth a standard that favors a finding of arbitrability when the parties have otherwise agreed to or subjected themselves to an arbitration scheme. Indeed, the US Supreme Court has exhorted lower courts to “generously construe” in favor of arbitrability. *Mitsubishi Motors Corp.*, 473 US at 626. As a condition of being recognized as NGB for speedskating, US Speedskating has had to agree to AAA arbitration for disputes involving the opportunity of athletes to participate. Similarly, as a result of their participation in US Speedskating events and by being a member of US Speedskating, the athletes are required to submit to arbitration for any such claims that they might have. This scheme is set forth in no fewer than 5 separate sections of the Act as well as in the USOC Bylaws under Section 9. I can think of no clearer way to manifest an intention to have cases involving the opportunity to participate in protected competitions arbitrated. The test for determining jurisdiction is not whether the athlete or athletes succeed on their claims but rather whether they have asserted on the face of their allegations a claim that is subject to arbitration jurisdiction. Here, the Claimants assert essentially that the conduct of US Speedskating, acting through its hired coaches, was so negative to their training and prospects for success and so frightened them that it amounted to a deprivation of their opportunity to participate in high level competition, certainly not on a level on par with other skaters who did not have similar problems or concerns with the coaches in question.

4.17 This is not the typical case of a denial or threatened denial of the opportunity to participate where an athlete alleges that their NGB has directly determined to not send the athlete to a protected competition event, yet the allegations are not so attenuated from the protected competitions at issue and are no less deserving of the protection of review by a neutral under Section 9 of the USOC Bylaws. In fact, I do not

believe the “threaten to deny” language in the USOC Bylaws is an accident; the use of the “threaten to deny” language to have any operative meaning must cover claims where the facts and circumstances suggest an indirect denial of a competition right is possible. Were I not to find that jurisdiction existed here, essentially Claimants would be without a timely or effective remedy to have their case heard and decided on an expedited basis, basically forcing them to choose between competing or not competing under the scheme they found so difficult and offensive without any neutral test of their correctness. In particular since this case involved allegations of coach initiated conduct directed at athletes, putting aside the legal basis that requires a finding of jurisdiction here, were I to dismiss for lack of jurisdiction I fear I would be considerably setting back the commendable effort of the USOC to bring well accepted safe sport principles and standards to bear across all of Olympic sports by depriving those who might be most aggrieved of their effective and timely remedy that could cause the least disruption to athlete training and preparation for international competitive excellence. While I must determine the scope of the contract providing for arbitration (here the statute), I cannot do so in a vacuum. Were an arbitrator to ignore claims by athletes that resulted from constructive or de facto denial or threatened denials of the opportunity to participate, as opposed to direct or de jure denials or threats to deny, it would be ignoring the clear purpose of the statutory scheme favoring arbitration of athlete disputes, the clear case law favoring resolution of sports disputes in arbitration and not in court, and the clear language of USOC Bylaws Section 9.

4.18 Accordingly, I find that sufficient basis exists to find arbitration jurisdiction in this case on these facts as alleged. This determination should not be read too broadly. At some level an individual asserting a claim under Section 9 or under the various provisions of the Act must allege that such there has been a colorable denial or threatened denial of the opportunity to participate; this is not a decision that opens the floodgates to arbitration of all or any issues when the nature of the issues subject to arbitration is prescribed by the Act (which is essentially the parties’ arbitration agreement). Claimants still must assert a justiciable claim of denial or threatened denial to get past a motion to dismiss for lack of jurisdiction.

**b. Shifting of Arbitration-related Fees and Costs**

4.19 Claimants seek to have the Arbitrator shift responsibility for their portion of the arbitration fees and costs (those fees of the arbitrator and of the AAA) to the Respondent. To determine this issue, I must first analyze the basis for such a request, then, if such a basis is adequately established, determine whether the facts and equity support allocation, and then if the facts and equity support allocation, determine a reasonable amount to shift.

4.20 Internationally, the general rule on allocating arbitration costs is the oft-quoted maxim that “the costs follow the event.” *E.g.*, Arbitration Act 1996 (Section 61(2)) (United Kingdom). *See generally Redfern and Hunter on International Arbitration* §9.93 (5<sup>th</sup> ed. 2009); Robert Smit and Tyler Robinson, “Cost Awards in International Commercial Arbitration: Proposed Guidelines for Promoting Time and

Cost Efficiency”, 20 *Am. Rev. Int’l Arb.* 267 (2009); Chartered Institute of Arbitrators, *Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration*. In other words, in international cases, the prevailing party can expect to receive an award in its favor that includes its own legal fees and other arbitration-related costs including the costs of the arbitrators and the arbitration institution.

4.21 Both the New York Convention and the FAA are silent on this topic.

4.22 Under the general rule in the United States in litigation and arbitration, a prevailing party is generally entitled to shifting of its reasonable attorney’s fees or costs to the non-prevailing party only upon the basis of contract or a stating providing for such shifting. *See, e.g.*, California Civil Code § 1717; College of Commercial Arbitrators, *Guide to Best Practices in Commercial Arbitration* 181 (2<sup>nd</sup> ed. 2010). In some limited circumstances, a court can also award a party’s attorney’s fees or costs where there exists some form of egregious misconduct during the course of the litigation or proceeding that might have prolonged the proceedings or unnecessarily or unreasonably increased the attorney’s fees or costs of their opponent. Here, it is conceded by Claimants, that none of these circumstances exist to justify shifting of their attorney’s fees to the remaining respondent.

4.23 But Claimants are seeking to collect from the remaining Respondent, US Speedskating, the amount of Claimants’ contribution to the costs of the arbitration, specifically the Claimants’ share of the filing fees they paid for the AAA and for the fees of the Arbitrator.

4.24 Section R-43 of the AAA Commercial Arbitration Rules (“AAA Commercial Rules”), titled “Scope of Award”, provides as follows:

“(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-49, R-50, and R-51. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.”

4.25 Section R-50 of the AAA Commercial Rules, titled “Expenses”, provides as follows:

“The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.”

4.26 These provisions of the AAA Commercial Rules are consistent with the text of the Revised Uniform Arbitration Act (“RUAA”), which provides in Section 21(c) that “an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding”, and its comment 2 stating “parties may provide for the remedy of attorney’s fees and other expenses in their agreement even if not otherwise authorized by law.” (statutory reference here to the AAA Commercial Rules with their Section R-50 broad discretion for arbitrators to make awards of arbitration fees almost certainly suffices here as constituting a proper basis for awarding arbitration costs if the RUAA applied). The RUAA has been adopted in many US states, though notably California and New York have retained their own arbitration statutes, which, while different, recognize similar principles. *E.g.*, Calif. C. Civ. Pro. § 1284.2 (“unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees for the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit”) (here the reference to the AAA Commercial Rules with its broadly discretionary Section R-50 suffices as the parties’ agreement on this point).

4.27 Essentially, under AAA Commercial Rules Section R-50, in the absence of an agreement between arbitrating parties to the contrary, the arbitrator has discretion to assess and award arbitrator and arbitral institution fees and expenses in the final award. This discretion does not appear to be bounded by any constraints, at least not on the face of the rule, and it appears that this Rule 50 applies irrespective of whether the parties have an express fees and costs shifting provision in their agreement or not; simply by agreeing to arbitrate under the AAA Commercial Rules, which include this provision, indicates the parties’ assent to and binds the parties to permit cost shifting should the arbitrator determine to do so. This arrangement is not unique to the AAA; other reputable arbitral institutions have similar rules on this subject. *Compare* R-50, with CPR Rules 17.2, 17.3 and JAMS Rule 24(f) and 31. *See generally* College of Commercial Arbitrators, *Guide to Best Practices in Commercial Arbitration* 181-82 (2<sup>nd</sup> ed. 2010)

4.28 Presumably, as is the case with the general freedom of parties to construct their arbitration by agreement as they see fit, this rule based cost shifting right could be modified by the parties in their agreement to arbitrate or in their arbitration clause (or, as here, in the relevant rules requiring submission to the AAA under the AAA Commercial Arbitration Rules subject to the limited modification procedure set forth in Section

220522(a)(4) of the Ted Stevens Olympic and Amateur Sports Act). No such rules modification is in existence for these cases as yet, so the Arbitrator is bound by the plain text of Section R-50.

4.29 I have searched the published cases that, like this one, arise under the Ted Stevens Act or Section 9 of the USOC Bylaws that either provide for cost shifting or that disallow a specific request therefor and not a single one of those cases provides any guidance whatsoever on the basis of the arbitrator's decisions in that regard. See *Members of the US Men's National Soccer Team v. United States Soccer Federation, Inc.* (AAA Case No. 30 190 00326 96, October 14, 1996); *Flenoy v. USA Track & Field* (AAA Case No. 30 190 206 97, July 1, 1997); *Reed v. USA Table Tennis* (AAA Case No. 30 190 01037 02, December 17, 2002); *Lopez v. United States Taekwondo Union* (AAA Case No. 30 190 00868 03, December 10, 2003); *Cutro-Kelly v. United States Judo* (AAA Case No. 30 190 00572 04, June 16, 2004); *McConneloug v. USA Cycling* (AAA Case No. 30 190 00750 04, July 20, 2004); *Smith v. USA National Karate-Do Federation* (AAA Case No. 30 190 01286 05, June 6, 2006); *Martinez-Pino v. USA Boxing* (AAA Case No. 13 195 02269 05, October 16, 2006); *Hunter v. USA Boxing* (AAA Case No. 77 190 00279 09, June 16, 2009); *Gunther v. US Speedskating* (AAA Case No. 77 190 0007 10, January 15, 2010); *Vogel v. US Speedskating* (AAA Case No. 77 190 00553 09, January 15, 2010); *Vinogradova v. US Biathlon Association* (AAA Case No. 77 190 00511 09, February 1, 2010); *Barry v. USA Boxing* (AAA Case No. 77 190 00049 11, March 8, 2011); *Craig v. USA Taekwondo* (AAA Case No. 77 190 00144 11, August 21, 2011); *Hamza v. United States Fencing Association* (AAA Case No. 77 190 00003 12, February 9, 2012); . I regret to note that this Arbitrator authored two of those decisions lacking such reasoning but providing for shifting (*Vinogradova* and *Craig*). I found one decision, ironically also involving US Speedskating as a party and charges of wrongdoing by a speedskating coach, that of *Kim v. US Speedskating* (AAA Case No. 77 190 E 00056 11), where the issue of costs shifting was addressed, by this Arbitrator, in rather perfunctory fashion but with basic reasoning, providing as follows:

“Normally, the Arbitrator would consider allocating the administrative fees and expenses of the AAA and the expenses and fees of the Arbitrator to the losing party absent a contractual provision saying otherwise. But here, US Speedskating bears some fault for this proceeding being before the AAA. As the Arbitrator determined above, US Speedskating failed to follow its own bylaws and the requirements of the Ted Stevens Olympic and Amateur Sports Act and the USOC Due Process Checklist by affording Mr. Kim a hearing prior to suspending him initially (Mr. Greenwald admitted this in his testimony); had US Speedskating done that it is very likely that this proceeding before the AAA would have been unnecessary and the matter could have been heard before the US Speedskating hearing body that would not have incurred such costs or expenses. Accordingly, the administrative fees and expenses of the AAA and the expenses and fees of the Arbitrator shall be shared equally.”

In sum, the *Kim* decision discussed shifting of arbitration fees and reasons for possibly doing so but declined to reallocate.

4.30 This Arbitrator is hoping to rectify, in part, the paucity of written arbitrator reasoning on this subject in the context of cases arising under the Ted Stevens Olympic and Amateur Sports Act and USOC Bylaws Section 9 with this section of this award.

4.31 Now that the Arbitrator has established that arbitration costs can be shifted within a broad range of arbitrator discretion, I must determine whether I should shift such arbitration costs here.

4.32 Considering all of the above legal standards, the Arbitrator is of the view that the entire AAA filing fees and the entire fees of the Arbitrator should be shifted to US Speedskating. The conduct that gave rise to the demand for arbitration in this case was directly the result of US Speedskating's decisions. US Speedskating hired and managed Coach Chun in his service as National Team Coach. US Speedskating was responsible for his actions directed toward the team and the report of White & Case that US Speedskating itself relied upon found that Coach Chun knew of the skate tampering by Simon Cho and did not report it. While the White & Case report was inconclusive on its review of the other factual allegations, and at least one evidentiary problem was raised with the accuracy of its description of the source of a key email, there was substantial evidence presented here demonstrating that US Speedskating knew of the complaints of the Claimants with respect to Coach Chun as early as July 9, 2012, and yet did not act to remedy the situation until months later, while team qualifying events and deadlines were impending. While Coach Chun was subject to an employment agreement with US Speedskating and may have had his own set of rights before having his service as National Team Coach being reduced in scope or terminated, US Speedskating took little action to accomplish that until well after this proceeding was filed.

4.33 It cannot be said that US Speedskating is "responsible" for the exceptional conduct of its coaches that undoubtedly exceeded the scope of their mandate from US Speedskating, but when comparing the relative equities and the innocence of Claimants in the underlying facts that gave rise to this proceeding, it is only appropriate that US Speedskating should bear the arbitration fees and costs.

4.34 It is eminently clear that a key element that sets sports apart from entertainment and other fields of endeavor is the important of time; timing drives all athlete training, performance, competition, and careers. It has been said that the opportunity to participate is fleeting, and it is because competition and biological schedules do not stop for anyone. Athletes age daily. Competitions will go on with or without an individual athlete's participation. So it is important for sports governing bodies to create systems that address issues as expeditiously as possible so that the impact of time is not felt unduly by athletes when they might be aggrieved. The USOC has recognized the importance of the impact of time in Section 9 of its Bylaws, which allows expedited arbitration proceedings on 24 hours notice; similar expedited procedures exist before the Court of Arbitration for Sport at the Olympic Games often on even shorter

notice. It behooves sports governing bodies to manage quickly and efficiently serious athlete grievances and allegations that come before them to avoid forcing athletes to feel like their only recourse is to bring an arbitration claim to obtain relief while contending with impending competition deadlines.

4.35 While there has been no determination on the merits, and while a determination on a motion challenging jurisdiction hardly counts to make one party or the other the prevailing party in the usual sense, US Speedskating was in the best position to police and address the conduct of its coaches and to take the steps sooner that it ultimately took in this case to remove the coaches from their role with the team. Accordingly, under these facts and circumstances, it would be unfair to leave the fees of the AAA and the Arbitrator lying solely with the Claimants.

4.36 At no time was I called upon, nor could I have been called upon with the limited evidence presented to me before the case on the merits was essentially rendered moot in advance of the hearing on the merits, to render a decision on the merits and I am not doing so in this decision. But I must allocate responsibility for the arbitration fees and costs and based on the procedural situation presented and I have done so. This is not to say that US Speedskating did anything wrong or incorrect, though perhaps there were other things it could have done or it could have done the things it did in a more expedited fashion to avoid this arbitration proceeding. But at some level I have been asked to make a decision to shift or not shift one half of the arbitration filing fees and the arbitrator fees and I have done so by this decision in favor of the Claimants. This decision should not be read as a general statement that Claimants are always entitled to shifting in their favor; this is a case and facts dependent analysis that will vary from case to case, as it should since the basis for such shifting under the AAA Commercial Rules rests soundly in the discretion of the Arbitrator.

4.37 Once I accept that costs should be shifted, it is well accepted that the Arbitrator is empowered to determine the quantum of costs that can be shifted. Generally, it appears from the jurisprudence that such shifted costs should be “reasonable”. I could determine to shift all, some, or none of the costs in my sole discretion absent a prohibition otherwise in the parties’ arbitration agreement or rules (no such prohibition exists here). Given that 100% of the fees requested are either the standard filing fees of the AAA or the fees based upon the hours I incurred multiplied by my reduced hourly rate, and that the bulk of the arbitration costs to be shifted consist of my own fees, I would be hard pressed to find that the costs here are unreasonable absent the presence of some other circumstance. Accordingly, I determine that the requested arbitration fees of the arbitrator and the filing fees of the AAA are reasonably calculated and reasonable under the circumstances and should be entirely shifted to Respondent, less the Arbitrator’s fees related exclusively to the drafting of the portion of this award on the determination of jurisdiction which have been separately identified and will be borne by the Claimants as they had previously agreed.



## V. AWARD

On the basis of the foregoing facts and legal aspects, the Arbitrator renders the following decision:

5.1 Claimants (as defined above) properly alleged jurisdiction in arbitration in this matter and Claimants' remaining claim for relief, for shifting of responsibility for the fees of the arbitrator and of the American Arbitration Association, is granted in its entirety, less certain fees agreed to be paid solely by Claimants.

5.2 The administrative filing and case service fees of the AAA, totaling \$850.00, shall be borne entirely by US Speedskating. The fees and expenses of the Arbitrator, totaling \$25,445.10, shall be borne as follows: \$3070.50 by Claimants (representing the fees and expenses of the Arbitrator relating to the rendering of the jurisdictional portion of this reasoned award), and \$22,374.60 by US Speedskating (representing all other fees and expenses of the Arbitrator). Therefore, US Speedskating shall reimburse Claimants in the manner they direct the sum of \$11,988.30, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Claimants. All fees due to the AAA or the other party shall be paid by the responsible party within 30 days of this Award.

5.3 This Award is in full and final settlement of all claims and counterclaims submitted to this arbitration. All claims not expressly granted herein are hereby denied.



Dated: December 15, 2012

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Jeffrey G. Benz, FCI Arb  
(jeffreybenz@gmail.com)  
Arbitrator